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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

SPENCER BERMAN et al., Plaintiffs and Appellants, v. BRIAN SMITH, Defendant and Respondent.	B180910 (Los Angeles County Super. Ct. No. SC069912)

APPEAL from a judgment of the Superior Court of Los Angeles County, Terry B. Friedman, Judge. Reversed.

Law Offices of Robert M. Baskin; and Arthur R. Liberty for Plaintiffs and Appellants.

Silva, Clasen & Raffalow and Yvonne Birch for Defendant and Respondent.

Plaintiffs Spencer Berman and Lois Grunwald appeal from the judgment dismissing their action against defendant Brian Smith for failure to diligently prosecute. Plaintiffs contend that the trial court abused its discretion in ordering dismissal. We reverse.

BACKGROUND

On December 27, 2001, plaintiffs filed a complaint against Smith, alleging personal injuries arising out of a January 6, 2001 automobile accident. Smith was served on September 8, 2004. Smith then filed a motion to dismiss for failure to diligently prosecute within two years. Smith's moving papers and plaintiffs' opposition include evidence of the following:

On February 20, 2002, plaintiffs' process server signed a "proof of non service return" in which he stated that two attempts had been made to serve Smith at an address on Walnut Avenue in Venice, California. On February 2, 2002, there was no answer at the door. On February 8, "Per occupant, servee is in Germany."

On March 1, 2002, plaintiffs' attorney, Arthur Liberty, wrote a letter to Mercury Insurance claims adjuster Rondalyn Spurlock which stated among other things that the letter would "serve to confirm our telephone conversation of this date wherein you confirmed your insured's active status in the military. Please keep us informed about his return to the United States and/or the termination of his active status. We would certainly like to proceed with litigation but cannot under the Soldiers and Sailors act."[1]

On August 28, 2002, in conjunction with a request for continuance of a case management conference, Liberty declared he had been informed by Mercury in March 2002 that Smith was a special forces member of the United States military and that he

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[1] Under the Soldiers' and Sailors' Civil Relief Act of 1940 (50 U.S.C. Appen. § 525), the period while serving in the military is to be excluded in determining time limitations for bringing or prosecuting court actions. (See *Buttler v. City of Los Angeles* (1984) 153 Cal.App.3d 520, 523.)

was "assigned out of Germany to central Asia (presumably Afghanistan) where he would remain indefinitely."

On October 16, 2003, Liberty wrote to Mercury Insurance claims adjuster Andrea Leone, stating, in similar language to his prior letter to adjuster Spurlock, that the letter would "serve to confirm our telephone conversation of this date wherein you confirmed that you have no new information regarding your insured's active status in the military. You also agreed to keep us informed about his return to the United States and/or the termination of his active status. We would certainly like to proceed with litigation but have been stymied by the events of September 11, 2001 and the Soldiers and Sailors act."

In November 2003, in response to an order to show cause issued by the court, Liberty declared that Mercury had confirmed Smith's status in the military and that Smith could not be served.

On May 26, 2004, Liberty wrote to Leone, again using language similar to his previous letters, confirming a telephone conversation of that date "wherein you confirmed that you have no new information regarding your insured's active status in the military. You also agreed to keep us informed about his return to the United States and/or the termination of his active status. We would certainly like to proceed with litigation but have been stymied by the Soldiers and Sailors act."

On June 4, 2004, Leone wrote to Liberty that she had been unable to contact Smith and therefore could not verify "if he is still active in the military or not." Leone offered to settle plaintiffs' claims for a total of $10,000.

Smith was served at his address on Walnut Avenue in Venice on September 8, 2004.

On November 24, 2004, Smith filed a motion to dismiss under Code of Civil Procedure sections 583.40 and 583.420 and California Rules of Court, rule 372, based on plaintiffs' failure to bring the matter to trial within two years of commencement. In declarations in support of the motion, Smith stated that he had lived at the Walnut Avenue address since 1990 with roommates Richard Smith and Jay Hudson. He had never served in the United States military. In 2002, he went to Europe four times on

business trips, each of which lasted approximately one and one-half weeks. One of these trips may have been to Germany in February 2002 (at the time that service was attempted). Smith's roommates each declared they had lived at the Walnut Avenue address since 1990 and had never advised anyone that Smith was in the military.

In further support of the motion, Mercury claims adjuster Leone declared that "[f]rom March, 2002, through October, 2004, I was the claims examiner handling the claims of Spencer Berman and Lois Grunwald. [¶] . . . Plaintiff's counsel Arthur Liberty advised Mercury Insurance that Brian Smith was in the military serving in Iraq. [¶] . . . At no time did I advise plaintiff's counsel or anyone else that Brian Smith was in the Military, or that he was serving in Iraq. [¶] . . . Mercury Insurance did not confirm or discomfirm the whereabouts of Brian Smith." In points and authorities, Smith argued prejudice in that the lawsuit involved an accident with cars traveling in a convoy on a dirt road for a Sierra Club trip and "[a]s such, there were a number of witnesses whose identi[t]y may be lost or whose memories may be dimmed at this time." No declaration of Mercury adjuster Spurlock was presented.

In opposition to the motion to dismiss, Liberty declared that "in March 2002, I was informed by defendant's carrier, Mercury Insurance, that defendant was a member of the . . . United States Military and that he was assigned out of Germany where he would remain indefinitely." Liberty further declared that in early September 2004 he received a telephone call from a Mercury claims adjuster advising that the adjuster had been contacted by Smith, who was now available to be served at his last known address.

The trial court ruled as follows: "Defendant meets his burden to establish grounds for discretionary dismissal. Plaintiff[s] filed this action December 27, 2001, but did not effect service on Defendant until September 8, 2004, more than two years after commencement of the action. [[Code Civ. Proc.] 583.420(a)(2)]. Clearly, Defendant is prejudiced by the difficulty in locating witnesses and gathering evidence about an incident that occurred four years ago. [Hocharian v. Superior Court (1981) 28 [Cal.3d] 714, 724]. Additionally, Defendant asserts that Plaintiffs were not diligent in serving Defendant. According to Defendant's Declaration, he has resided at the same local

address since 1990 and has been out of the country only for brief periods of time, yet Plaintiffs made only two efforts to serve him there in 2002. [[Cal. Rules of Court] 373(e); San Ramon Valley Unified School District v. Wheatley-Jacobsen (1985) 175 [Cal.App.3d] 1050, 1057]. Thus, the burden shifts to Plaintiffs to show excusable delay. [Ibid.]

"Plaintiffs' evidence of excusable delay is weak. It consists of a Proof of Non Service, in which a process server declares that he made two attempts to serve Defendant on February 6 and 8, 2002. On February 6th, there was no answer at the front door and on February 8th, its states 'Per occupant, servee is in Germany.' Apparently, Plaintiffs made no further attempt to serve Defendant until September 2004. Plaintiffs' remaining evidence is one-sided correspondence sent by Plaintiffs' counsel to Defendant's insurer, in which counsel states that he is confirming a recent telephone conversation in which the insurer's agent 'confirmed that you have no new information regarding your insured's active status in the military.' In contrast, Defendant declares that he has never been in the military. Plaintiff[s] offer[] no evidence of any other efforts to locate Defendant or independently confirm his military status. Plaintiffs' evidence cannot overcome the consistent declaration testimony by Defendant and his two roommates that he has resided at the same local address during the entire pendency of this action. Additionally, Defendant's two roommates each declared that they never informed anyone that Defendant was in the military. [¶] The Motion is granted."

STANDARD OF REVIEW

"'It has been aptly remarked that [Code of Civil Procedure] section 583.420 and the other dismissal-for-delay statutes serve a dual purpose: "[O]ne is effectually the same as that of statutes of limitations—they are both statutes of repose, seeking to discourage stale claims 'to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.' [Citations.] Secondly, the dismissal section is designed to compel reasonable diligence in the prosecution of actions, thereby expediting the administration of justice. [Citations.]" [Citations.] Balanced against these

considerations is, of course, the strong public policy which seeks to dispose of litigation on the merits rather than on procedural grounds. [Citations.] Although that policy is generally viewed as more compelling than the one seeking to promote prompt prosecution [citations], it will not prevail unless the plaintiff meets his burden of establishing excusable delay. [Citation.]' [Citation.]

"'When the trial court has ruled on such a motion, "'unless a clear case of abuse is shown and unless there has been a miscarriage of justice a reviewing court will not substitute its opinion and thereby divest the trial court of its discretionary power.'" [Citations.] "'The burden is on the party complaining to establish an abuse of discretion. . . .'" [Citation.]' [Citation.]" (*Roach v. Lewis* (1993) 14 Cal.App.4th 1179, 1182–1183.) In seeking to show abuse, the appellate court should not substitute its discretion for that of the trial court. "'Even though contrary findings could have been made, an appellate court should defer to the factual determinations made by the trial court when the evidence is in conflict. This is true whether the trial court's ruling is based on oral testimony or declarations. [Citation.]'" (*Id*. at p. 1185.)

DISCUSSION

In *Roach v. Lewis*, *supra*, 14 Cal.App.4th 1179, this court considered the appeal of a personal injury plaintiff whose action had been dismissed for delay in prosecution notwithstanding the declaration of the plaintiff's counsel that the delay was in his client's best interests because of stress and pressure the client might suffer from the litigation. In *Roach*, we analyzed the then-recent opinion of *Putnam v. Clague* (1992) 3 Cal.App.4th 542, in which the plaintiff's counsel purposefully delayed the prosecution of the action because counsel was pursuing another action as a lead case against the same defendant on the same type of claim. The *Putnam* court concluded that dismissal for delay in prosecution was inappropriate in the case before it and proposed the following test:

"'When the plaintiff offers some explanation or excuse reflecting a conscious decision not to serve or otherwise prosecute the action, we believe there are two essential questions the court must initially address. Is the explanation credible under all the circumstances? If the facts are disputed and the trial court finds on substantial evidence

that the explanation is merely an afterthought or pretext designed to cover up neglect, dismissal may be warranted. If the explanation is credible, however, the court should consider whether the reasons given for the decision are clearly unreasonable. That is, could a reasonably competent attorney conclude that delay was justified under the circumstances?' ([*Putnam v. Clague*, *supra*,] 3 Cal.App.4th at pp. 557–558.)" (*Roach v. Lewis*, *supra*, 14 Cal.App.4th at pp. 1183–1184.)

In *Roach*, although we concluded that *Putnam* was a "sound decision," we expressed "doubts about the test itself," reasoning that "the cause that an attorney espouses should not be advanced simply because the trial judge finds that the attorney is not lying" and that judicial deference should not be accorded solely because a reasonably competent attorney is of the opinion that delay is justified. (*Roach v. Lewis*, *supra*, 14 Cal.App.4th at p. 1184.) We continued in *Roach* by noting that the trial court had found the plaintiff's counsel's explanation "neither 'credible [n]or reasonable,'" and that based on the record before us, "the trial court properly rejected [counsel's] excuses." (*Id*. at p. 1185.) We further noted that, given our agreement with the trial court's credibility determination, the plaintiff "would find little solace even under the *Putnam* test." (*Roach v. Lewis*, *supra*, 14 Cal.App.4th at p. 1185, fn. 2.)

On appeal here, Smith argues that plaintiffs are improperly relying on the *Putnam* test rather than applying *Roach*. That argument is of no moment because, as we read the record, the trial court's ruling is not sustainable under either case.

If Liberty was telling the truth in asserting that Mercury adjuster Spurlock told him in their conversation of March 1, 2002, that Smith was in the military and had been "assigned out of Germany," Liberty would have had no basis for doubting Spurlock's representation, especially in view of the process server's notation that Smith was in Germany when service was attempted three weeks earlier. Significantly, Smith did not attack the credibility of Liberty's claim that this conversation with Spurlock occurred. Instead, adjuster Leone merely declared that she took over the claim on an unspecified date in March 2002 and did not thereafter tell Liberty that Smith was in the military. But nothing in Leone's declaration or in any other portion of Smith's motion addresses

Mercury's failure to disabuse Liberty of the notion, set forth in Liberty's declarations and letters confirming telephone conversations with Mercury over a 26-month period, that Smith was in the active military and was therefore unavailable to be served.

Nor did the trial court make a credibility finding against Liberty on the issue of whether he had been told by Mercury of Smith's military status. Rather, although in its ruling the court characterized Liberty's letters as "one-sided correspondence," the content of the correspondence was contrasted with the declarations of Smith and his roommates. The trial court did not rely on Leone's denial of what Liberty claimed she told him. And while it is of course impossible for Smith to have both been in the military and not been in the military at the same time, it is readily conceivable that Liberty was told that Smith was in the military even though this was not true.

The trial court also focused on plaintiffs' failure to "independently confirm" Smith's military status. This focus begs the question. If Liberty was not told by Mercury that Smith was in the military or if there had been anything ambiguous about that information, independent confirmation would be in order. But, as stated, the trial court did not conclude that Liberty was not credible in reiterating what Mercury had told him and there is nothing in the record to suggest that the information was ambiguous. As such, plaintiffs' failure to attempt service until being informed by Mercury that Smith was now available did not provide a valid basis for charging plaintiffs with unreasonable delay in prosecution.

The trial court further concluded that Smith was prejudiced by the delay due to the difficulty in gathering evidence and locating witnesses. Nevertheless, the only basis for this conclusion was Smith's assertion of *potential* prejudice due to the passage of time. No evidence was presented that any witnesses or evidence had in fact been lost or that Smith had suffered actual prejudice. Because plaintiffs' delay in this matter was reasonable, the potential for prejudice is not sufficient to justify dismissal. (See *Putnam v. Clague*, *supra*, 3 Cal.App.4th at pp. 563–564; *Ladd v. Dart Equipment Corp.* (1991) 230 Cal.App.3d 1088, 1102.)

DISPOSITION

The judgment is reversed. Plaintiffs are entitled to costs on appeal.

NOT TO BE PUBLISHED.

MALLANO, J.

We concur:

SPENCER, P. J.

ROTHSCHILD, J.